

## **Appendix H**

### **SUMMARY OF INFORMATION PRIVACY LAWS AND GUIDANCE FROM U.S. DEPARTMENT OF EDUCATION**

## INFORMATION PRIVACY LAWS

[This summary was prepared by Skadden, Arps for the Virginia Tech Review Panel]

### All Law Enforcement Agencies

- Upon request, must disclose basic criminal incident information (such as a description of the crime and the date it occurred) about felony crimes.
- Upon request, must release the name and address of anyone arrested and charged with any crime.
- Upon request, must release all records about an incident that was not a crime. However, the agency must remove all personal information such as social security numbers.
- Upon request, may release information from investigative files. Law enforcement agencies typically adopt a policy against disclosure.

### Universities and Campus Police Departments

- Must keep a publicly-available log that lists all crimes. The log must give the time, date, and location of each offense, as well as the disposition of each case.
- Must disclose the name and address of people arrested for felonies and misdemeanors involving assault, battery, or "moral turpitude."

### Juvenile Law Enforcement Records

- Records restricted from disclosure. Agencies can release the records to other parts of the juvenile justice system or to parents.
- Officials may release to school principals information about certain offenders who commit serious felonies, arson, or weapons offenses.

### Judicial Records

- Generally, court records can be widely shared.
- Juvenile records are tightly restricted. They can only be disclosed outside the juvenile justice system with a court order.
- Records of commitment hearings must be sealed when the subject of the hearing requests it. If sealed, the records can only be accessed through court order.

- Commitment hearings must be open to the public, so certain information is not required to be kept in confidence: name of the subject, and the time, date, and location of the hearing.

## **Medical Information**

- Governed by both state and federal law.
- Federal law is the Health Insurance and Portability and Accountability Act of 1996 and the regulations interpreting it. Virginia law is the Virginia Health Records Privacy Act.
- In most respects, the federal and state laws are similar and can be analyzed together.
- Both laws state that health information is private and can only be disclosed for certain reasons.
- HIPAA can pre-empt a state law, making the state law ineffective. This generally occurs when state law is less protective of privacy than federal law.
- The laws apply to all medical providers and billing entities. They define "provider" broadly: doctors, nurses, therapists, counselors, and social workers, as well as HMOs, insurers, and other health organizations are all included in the definition.
- Requires disclosure of records to patients who are the subject of the records.
- Allows disclosure to anyone when a patient fills out a written authorization.
- Allows sharing when it is necessary for treatment.
- Allows disclosure to relatives with permission or in emergency situations.
- Allows disclosure in situations where legislators and rule-makers have concluded that privacy is outweighed by other interests. For example, providers may disclose in certain situations when an individual presents an imminent threat to the health and safety of individuals and the public. Providers may also disclose information to law enforcement when necessary to locate a fugitive or suspect.
- Providers may disclose information when state law requires it, such as in mandated reports for domestic violence injuries. If the state law only permits disclosure and does not require it, federal law will invalidate the state law.
- Federal law does not apply to records held by school medical facilities. State law does apply.

## Educational Records

- Privacy of educational records is primarily governed by federal law, the Family Educational Rights Privacy Act of 1974, as well as regulations that interpret the law.
- FERPA applies to all educational institutions that accept federal funding, whatever the level. As a practical matter, this means almost all institutions of higher learning as well as public elementary and secondary schools.
- FERPA states that information from educational records is private and can only be disclosed for certain reasons.
- FERPA has a different focus than HIPAA. HIPAA protects all medical information gained in the course of treatment, whether in oral or written form. FERPA applies only to information in student records. Personal observations, including information gained from a conversation with a student, fall outside FERPA.
- Applies to health records maintained at university health clinics. However, it was not drafted to address specific issues of medical information.
- State laws about health records also apply. Disclosure is not permitted when a state law is less protective of health records privacy than FERPA. However, state law can be more protective than FERPA. State law can restrict disclosure that FERPA authorizes.
- Records created and held by law enforcement agencies for law enforcement purposes fall outside of FERPA.
- If a law enforcement agency shares a record with the school, the record that is maintained by the school becomes subject to FERPA. The record kept by the law enforcement agency is not subject to FERPA.
- Authorizes disclosure of any record to parents who claim adult students as dependents for tax purposes.
- Authorizes release to parents when the student has violated alcohol or drug laws and is under 21.
- Authorizes use of information by all school officials designated to have a legitimate educational interest in receiving such information.

- Authorizes disclosure of the final result of a disciplinary proceeding that held that a student violated school policy for an incident involving a crime of violence (as defined under federal law) or a sex offense.
- Allows state law to authorize certain uses in the juvenile justice system.
- Authorizes emergency disclosure to any appropriate person in connection with an emergency, “if the knowledge of such information is necessary to protect the health or safety of the student or other persons.”
- This exception is to be narrowly construed.

### **Government Data Collection and Dissemination Practices Act**

- Establishes rules for collection, maintenance, and dissemination of individually-identifying data.
- Does not apply to police departments or courts.
- Agencies that are bound by the Act may only disclose information when disclosure is permitted or required by law. "Permitted by law" to include any official request.
- If an agency requests data from another agency for a function it is legally authorized to perform, the request is official.
- The agency releasing the data must inform individuals when their data is disclosed.

## GUIDANCE FROM U.S. DEPARTMENT OF EDUCATION

### Disclosure of Information from Education Records to Parents of Students Attending Postsecondary Institutions

Recently many questions have arisen concerning the Family Educational Rights and Privacy Act (FERPA), the federal law that protects the privacy of students' education records. The Department wishes to clarify what FERPA says about postsecondary institutions sharing information with parents.

#### ***What are parents' and students' rights under FERPA?***

At the K-12 school level, FERPA provides parents with the right to inspect and review their children's education records, the right to seek to amend information in the records they believe to be inaccurate, misleading, or an invasion of privacy, and the right to consent to the disclosure of personally identifiable information from their children's education records. When a student turns 18 years old or enters a postsecondary institution at any age, these rights under FERPA transfer from the student's parents to the student. Under FERPA, a student to whom the rights have transferred is known as an "eligible student." Although the law does say that the parents' rights afforded by FERPA transfer to the "eligible student," FERPA clearly provides ways in which an institution can share education records on the student with his or her parents.

While concerns have been expressed about the limitations on the release of information, there are exceptions to FERPA's general rule that educational agencies and institutions subject to FERPA may not have a policy or practice of disclosing "education records" without the written consent of the parent (at the K-12 level) or the "eligible student."

#### ***When may a school disclose information to parents of dependent students?***

Under FERPA, schools may release any and all information to parents, without the consent of the eligible student, if the student is a dependent for tax purposes under the IRS rules.

#### ***Can a school disclose information to parents in a health or safety emergency?***

The Department interprets FERPA to permit schools to disclose information from education records to parents if a health or safety emergency involves their son or daughter.

#### ***Can parents be informed about students' violation of alcohol and controlled substance rules?***

Another provision in FERPA permits a college or university to let parents of students under the age of 21 know when the student has violated any law or policy concerning the use or possession of alcohol or a controlled substance.

***Can a school disclose law enforcement unit records to parents and the public?***

Additionally, under FERPA, schools may disclose information from “law enforcement unit records” to anyone – including parents or federal, State, or local law enforcement authorities – without the consent of the eligible student. Many colleges and universities have their own campus security units. Records created and maintained by these units for law enforcement purposes are exempt from the privacy restrictions of FERPA and can be shared with anyone.

***Can school officials share their observations of students with parents?***

Nothing in FERPA prohibits a school official from sharing with parents information that is based on that official’s personal knowledge or observation and that is not based on information contained in an education record. Therefore, FERPA would not prohibit a teacher or other school official from letting a parent know of their concern about their son or daughter that is based on their personal knowledge or observation.

***How does HIPAA apply to students’ education records?***

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is a law passed by Congress intended to establish transaction, security, privacy, and other standards to address concerns about the electronic exchange of health information. However, the HIPAA Privacy Rule excludes from its coverage those records that are protected by FERPA at school districts and postsecondary institutions that provide health or medical services to students. This is because Congress specifically addressed how education records should be protected under FERPA. For this reason, records that are protected by FERPA are not subject to the HIPAA Privacy Rule and may be shared with parents under the circumstances described above.

In all of our programs here at the Department of Education, we consistently encourage parents’ involvement in their children’s education. FERPA is no exception. While the privacy rights of all parents and adult students are very important, there are clear and straightforward ways under FERPA that institutions can disclose information to parents and keep them involved in the lives of their sons and daughters at school.